THE OHIO RIOT LAWS

I. INTRODUCTION

The reaction to the recent wave of civil disorders which have swept the country has been intense and varied. Many articles have appeared which treat civil disobedience as a distinct philosophical phenomenon or as a result of social injustice.[1] The legislative responses to the riots have been nearly as varied as the political slogans of "law and order" and that of "meaningful justice." Some states have enacted statutes directed at the unresolved grievances within the ghetto community caused by discrimination and years of deprivation.[2] Other legislatures have concentrated upon control of riots in order to maintain civil order. It seems that the proper solution to the civil disorders should be a combination of riot control measures and social programs. While long-range social programs and reforms are necessary to remove the causes of the civil disorders, riot control measures are also needed to deter large scale damage to persons and property.

Ohio's response to the recent disturbances has been the enactment of a number of riot control measures. This article deals with the content, application and constitutionality of several of these recent statutes.

II. SECTIONS 2923.52 AND 2923.53: RIOT IN THE FIRST AND SECOND DEGREE

Among the new riot statutes are the offenses of riot in the first degree[3] (hereinafter referred to as Riot I) and riot in the second degree[4]

[1] For discussions on the problems involved in contemporary civil disobedience, *see generally*: Allen, *Civil Disobedience and the Legal Order*, 36 U. CIN. L. REV. 1 (1967); Black, *The Problem of the Compatibility of Civil Disobedience with American Institutions of Government*, 43 TEXAS L. REV 492 (1965); Freeman, *Moral Preemption Part I: The Case for the Disobedient*, 17 HAST. L.J. 425 (1966); Freilich, *The Emerging General Theory of Civil Disobedience within the Legal Order*, 45 J. OF URBAN L. 563 (1968); Grimshaw, *Changing Patterns of Racial Violence in the United States*, 40 NOTRE DAME LAW. 534 (1965); Keeton, *The Morality of Civil Disobedience*, 43 TEXAS L. REV. 507 (1965); Lohman, *Violence in the Streets: Its Context and Meaning*, 40 NOTRE DAME LAW. 517 (1965); Powell, *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 205 (1966); Smith & Smith, *First Amendment Freedoms and the Politics of Mass Participation: Perspective on the 1967 Detroit Riot*, 45 J. OF URBAN L. 503 (1968); Stringfellow, *The Violence of Despair*, 40 NOTRE DAME LAW. 527 (1965); Wilkins, *The Riots of 1964: The Causes of Racial Violence*, 40 NOTRE DAME LAW. 552 (1965); Note, *Contemporary Civil Disobedience: Selected Early and Modern Viewpoints*, 41 IND. L.J. 477 (1966).

[2] The response is that of Wisconsin. As stated in STAFF, REPORT TO THE WISCONSIN HOUSE JUDICIARY COMMITTEE ON CRIMES AGAINST PUBLIC PEACE AND ORDER (1968) is the following:

> Notwithstanding the disorders which occurred in Milwaukee in the summer of 1967, there has been no request for legislation to tighten riot laws or provide more effective penal sanctions against riots. However, a number of bills were introduced in the Wisconsin legislature, directed at the underlying causes of social unrest, such as inadequate housing, poverty and unemployment.

Also, the District of Columbia City Council recently passed a regulation limiting police use of force. New York Times, Dec. 18, 1968 at 27.

[3] OHIO REV. CODE ANN. § 2923.53 (Page Supp. 1968).

(hereinafter referred to as Riot II). In the course of analysis each of the statutes will first be outlined in its essential elements. Each element will then be considered with regard to the meaning of the terms used within it, the meaning of each element as a whole, its probable effect on the application of the statute and possible Constitutional issues raised by it.

A. *Riot in the Second Degree*

The offense of Riot II consists of the following elements:

A. Participation with four or more persons in

B. Conduct which is (1) violent *and* (2) tumultuous

C. With the intent to (1) do a lawful act with unlawful force *and* violence *and* in such a manner as to create a clear and present danger to the safety of persons or property; or (2) prevent or coerce official action or to hinder, impede or obstruct a function of government; or (3) commit or facilitate the commission of a misdemeanor.

1. Participation

In Riot II, the participation which is proscribed refers to an activity comprised of violent and tumultuous behavior rather than the several intents embodied in the statute. Participation includes not only the situation in which five or more people engage in violent and tumultuous conduct in a coordinated fashion or with a common purpose, but also the situation in which a person, not knowing the purpose of the violent and tumultuous conduct of four or more others, joins in it with one of the three intents contained in the statute.[5] The requirement of participation generally precludes the application of the section against non-participants such as bystanders and the press.[6] Once a bystander joins in the violent and tumultuous conduct, however, he becomes a participant and may be guilty of Riot II if he has one of the required intents.

2. Violent and Tumultuous Conduct

Violent and tumultuous conduct consists of conduct which is both forceful and turbulent.[7] Although both words apply to many types of

[4] OHIO REV. CODE ANN. § 2923.52 (Page Supp. 1968).

[5] This should be contrasted with OHIO REV. CODE ANN. § 2921.14 (Page 1953) entitled "Conspiracy to Defraud the State." In reference to this statute it has been said that while some act is required, it is essentially a crime of intent, and "[t]he unlawful combination and confederacy constitute the essential element of the criminal conspiracy rather than the overt acts done in pursuance thereof. . . ." State v. Lucas 39 Ohio Ops. 519, 520 (1959). The act also makes each of the parties participating in the intent guilty of the crime. Under Riot II only the person with one of the three enumerated intents could be convicted of Riot II and the four or more others would not be guilty of the crime unless they also had one of these intents.

[6] The possibility that an exception to this could occur through the Ohio aider and abettor statute is considered in section III of this article.

[7] BLACK'S LAW DICTIONARY 1743 (4th ed. 1951) defines violent as "moving, acting, or

conduct, it is possible to have situations in which the conduct is violent but not tumultuous[8] and even more likely to have conduct which is tumultuous but not violent.[9] The statute requires that the conduct of the individual to be charged and that of four or more other persons be both violent and tumultuous.

3. Intent

The elements of intent listed in the statute seem to apply to the individual being charged rather than the four or more others who are acting in a violent and tumultuous manner. Any of the four or more others who did not have one of the required intents would not be guilty of Riot II. This statute does not sanction the mass arrest of everyone in the riot area even if they fail to disperse on order.[10]

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characterized, by physical force, especially by extreme and sudden or by unjust or improper force. . . ." While tumultuous was not found in any law dictionary examined, there are several cases which have defined it. The most pertinent of these cases, State v. Brown, 69 Ind. 95 (1879), concerns a conviction under an 1878 Indiana riot statute which bears a strong resemblance to Riot II. In this case the court found that a *charivari* conducted with zeal and earnestness was tumultuous. In a similar vein City of Madisonville v. Bishop, 113 Ky. 106, 67 S.W. 269 (1902) held that a group of people throwing fireworks in a Christmas celebration was tumultuous. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 2462 defines tumultuous as "full of commotion and uproar."

[8] While many lay dictionaries list violent as a synonym for tumultuous, it is possible for five or more people to engage in violent behavior which is in fact very orderly. An example of this would be a well executed robbery.

[9] Tumultuous situations which do not necessarily involve violence are encountered quite frequently. Examples would be a departing crowd from a movie or football game, a county fair, or the sidewalks of a business district during rush hour. Many situations though not violent partake of the noise, confusion, and agitation characteristic of an unlawful assembly or its acts. City of Madison v. Bishop, 113 Ky. 106, 67 S.W. 269 (1902).

[10] Compare the narrowness of coverage of Riot II with the breadth of the following two sections of the MODEL PENAL CODE (Proposed Official Draft, 1962).

Section 250.2 of the Code states in part:

> A person is guilty of disorderly conduct, if with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
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> (a) engages in fighting or threatening, or in *violent or tumultuous* behavior; or
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> (b) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or
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> (c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor. (emphasis added)

Section 250.1.2 incorporates the above definition in providing:

> Where [three] or more persons are participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm, a peace officer or other public servant engaged in executing or enforcing the law may order the participants and *others in the immediate vicinity* to disperse. A person who refuses or knowingly fails to obey such an order commits a misdemeanor. (emphasis added)

In a comment the author notes that ". . . Subsection [250.1.2] mainly affects 'others in the immediate vicinity' " and not the participants in the disorderly conduct.

Also compare the coverage of Riot II with former section 3761.14, § 1 No. 937 (1957) 127 LAWS OF OHIO 1106 (repealed 1968) which places criminal liabilities on all the persons who are riotously assembled.

> Whenever three or more persons are unlawfully or riotously assembled, all judges, sheriffs, and other ministerial officers . . . shall make proclamation . . . to disperse and depart . . . and if such persons do not then forthwith disperse and depart, such officers

A difficulty that arises with respect to both Riot statutes is the exact content of the word intent. In acknowledgment of the ambiguity of this word the Model Penal Code[11] bases culpability on whether a person ". . . acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense."[12] The difficulties encountered due to the vagueness of the word intent are easily illustrated by its use in the first mental element of Riot II.

The first mental element of Riot II is the intent to do a lawful act with unlawful force and violence in such a manner as to create a clear and present danger to the safety of persons or property. This element is so constructed that it is impossible to state its plain meaning. The ambiguity arises from the four possible interpretations of the word intent[13] and the possibility that intent could refer in any of its four meanings to the following phrases: lawful act; force and violence; unlawful force and violence; manner; manner as to create a clear and present danger.

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shall call upon all persons . . . to aid and assist in dispersing and taking into custody all such persons.

Both the Model Penal Code and former Ohio Revised Code section 3761.14 are alike in the respect that all those in the riotous assembly, possibly including bystanders, may be taken into custody if they fail to disperse upon the order of an appropriate public official. Riot II and Riot I, however, require both participation and a defined intent to justify an arrest.

[11] MODEL PENAL CODE § 2.02 (Proposed Official Draft, 1962).

[12] *Id.* § 2.02(2) provides:

(2) *Kinds of Culpability Defined.*

(a) *Purposely.*

A person acts purposely with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes they exist.

(b) *Knowingly.*

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) *Recklessly.*

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) *Negligently.*

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

See also MODEL PENAL CODE § 2.02 Comment (Tent. Draft No. 4, 1955) at 12-13, 123-132.

[13] *See* text accompanying note 11 *supra.*

In light of this ambiguity it is appropriate to consider the possible meaning of intent in the light of various rules of construction.

Under the rule of strict construction a statute is ". . . interpreted strictly against the state . . . and liberally in favor of an accused."[14] As purpose is the most aggravated form of criminal intent recognised by the Model Penal Code,[15] this rule would require that the actor have purpose with respect to each part of the element.

While it is speculative whether intent includes knowledge, it appears from several standpoints to be unlikely. First, Riot I explicitly mentions culpability based on knowledge only with respect to the use of deadly weapons.[16] This could be interpreted as signifying that knowledge will not suffice with respect to the other elements. Second, the Model Penal Code, which bears a striking resemblance to many parts of Riot I and Riot II[17] uses the word purpose where the statutes use the word intent. It is also relevant to note that as Ohio's criminal statutes are generally couched in terms of "intent", it is quite possible that the legislature merely substituted it for purpose without meaning to change the substance of the statutes.[18]

It is very unlikely that intent as used in the statutes includes either recklessness or negligence. In *Cox v. Louisiana*[19] Cox, the leader of a peaceful demonstration, was convicted of a "disturbing the peace" statute. The Court found that:

> [t]he statutory crime consists of two elements: (1) congregating with others 'with intent to provoke a breach of the peace, *or under circumstances such that a breach of the peace may be occassioned*, and (2) a refusal to move on after having been ordered to do so by a law enforcement officer. (emphasis added)[20]

In addition it noted that:

> [t]he Louisiana Supreme Court [had] in this case defined the term 'breach of the peace' as '*to agitate, to arouse from a state of repose*, to molest, to interrupt, to hinder, to disquiet.' (emphasis added)[21]

Based on the premise that peaceful demonstrations are forms of free speech and free assembly, the Court found that statute unconstitutionally

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[14] Columbus v. DeLong, 173 Ohio St. 81, 83, 180 N.E.2d 158 (1962).

[15] *See* note 12 *supra.*

[16] OHIO REV. CODE ANN. § 2923.53 (Page Supp., 1968).

[17] MODEL PENAL CODE § 250.1 (Proposed Official Draft, 1962).

[18] *Compare* the sections of the MODEL PENAL CODE set forth in note 10, *supra, with* Riot I and Riot II. They are in many ways identical with the exception that the word intent is substituted for purpose.

[19] 379 U.S. 536, 538 (1965).

[20] *Id.* at 551.

[21] *Id.*

broad in scope.[22] It was felt that this definition ". . . would allow persons to be punished merely for peacefully expressing unpopular views."[23]

To contend that intent includes recklessness or negligence is to say that a person may be guilty of Riot II if his otherwise legal behavior is under *circumstances such that a breach of the peace may be occassioned* or that it might *arouse* someone else to violate the law. Thus a person whose sole purpose was to participate in a peaceful demonstration could be held to have violated Riot II (or Riot I) if the peaceful demonstration was turned into a violent and tumultuous melee by the predictable actions of hostile bystanders. This result would be contrary to *Cox* and cause the statute to be held unconstitutionally broad in scope.

The interpretation of intent as purpose also serves to clarify the connection between the elements of intent and the elements of conduct in these statutes. That is, while one might contend that a literal interpretation of this statute (as well as Riot I) would encompass a situation in which a person while participating in violent and tumultuous assembly was intending to prevent or coerce official action in a way that was completely unconnected with his conduct, it is highly improbable that this was intended by the legislature.[24] When the word purpose[25] is substituted for intent, the connection becomes clearer. It would make little sense to contend that someone participated in violent and tumultuous conduct with the purpose to commit a misdemeanor unless there is a proximate or causal relationship between the behavior and the purpose.[26]

The purpose to do a lawful act with unlawful force and violence in such a manner as to create a clear and present danger to the safety of persons or property can be divided into two elements. The first element

[22] *Id.* at 551, 552.

[23] *Id.* at 551.

[24] To hold otherwise would seem to make the content of the statutory language so vague and indefinite as to violate the principles of due process which require fair notice and proper standards for adjudication. *See generally* Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960); *see also* Landry v. Daley, 280 F. Supp. 938 (N.D. Ill. 1968), *juris. noted sub. nom.* Boyle v. Landry, No. 244, 37 U.S.L.W. 3208 (U.S., Dec. 9, 1968). In the absence of a state court's construction of the statute, a federal court will use ". . . a normal and natural construction of statutory language or even a narrow interpretation thereof [if it] will preserve the constitutionality of a statute. . . ." *Id.* at 967.

[25] The probable definition of intent is purpose. *See* text accompanying notes 14 through 24, *supra.*

[26] Consider the following examples:

(a) A is participating in violent and tumultuous conduct with B, C, D and E. While thus participating, A is thinking about a misdemeanor he is planning to commit next week. A would not be guilty of Riot II as the purpose of his present conduct was not to commit or facilitate in the commission of the future misdemeanor.

(b) A engages in violent and tumultuous conduct with B, C, D and E. A hopes that the disturbance he creates will decoy law enforcement officers from an area in which G is to commit a misdemeanor. A would be guilty of Riot II as the purpose of his conduct is to facilitate the commission of a misdemeanor.

(c) A engages in violent and tumultuous conduct with B, C, D and E in the state house. A wants the commotion to impede the legislative hearings currently in session. A would be guilty of Riot II as the purpose of his conduct is to obstruct a function of government.

can be paraphrased as follows: the purpose to do a lawful act with force and violence which is without authority of law.

Unlawful is not only a synonym of illegal or criminal,[27] but is more generally defined as characterizing something which is either not sanctioned by law or is against public policy.[28] The requirement that the purpose be to use force and violence without authority of law limits

> the scope of the enactment by excepting those situations in which the law recognizes a justifiable use of force, such as by police officers, to the extent reasonably necessary to effect an arrest; by persons acting in self-defense, etc.[29]

The purpose to use unlawful force and violence must be accompanied with a purpose to use them in a manner which creates a clear and present danger to the safety of persons or property. It is interesting to note that if one injured a person through an act by which he purposely created a clear and present danger to that person, he could be said to have knowingly or recklessly injured that person.[30] In this rather limited sense Riot II might be said to include knowledge or recklessness as intent.

The second element of intent in Riot II is the intent to prevent, coerce, hinder, impede or obstruct a function of government. It is quite clear that a statute applying criminal sanctions to conduct done for the above purposes could, in some circumstances, restrict the exercise of first amendment rights. Whether such a statute does, in fact, restrict these rights and is thus constitutionally invalid depends upon the conduct which must accompany the purposes. As the cases below indicate, the requirement in Riot II that the conduct be violent and tumultuous would seem to avoid constitutional invalidity.

In *Edwards v. South Carolina*,[31] *Cox v. Louisiana*[32] and *Brown v. Louisiana*[33] the Supreme Court overturned convictions based on state statutes which embodied the common law crime of breach of the peace. In each of these cases the statutes were held unconstitutionally void as they allowed ". . . persons to be punished merely for *peacefully* expressing unpopular views."[34] In none of these cases was there any evidence of a planned or intended disorder. There was also no evidence of viola-

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[27] BLACK'S LAW DICTIONARY 1705, (4th ed. 1951).

[28] State v. Blackledge, 243 N.W. 534 (Iowa App. 1932); Commonwealth v. Hunt, 45 Mass. 111 (1842); Williams v. State, 27 Ala. App. 504, 175 So. 335 (1937).

[29] Landry v. Daley, 280 F. Supp. 938, 954 (1968).

[30] *See* note 12 *supra.*

[31] 372 U.S. 229 (1963).

[32] 379 U.S. 536 (1965).

[33] 383 U.S. 131 (1966).

[34] Cox v. Louisiana, 379 U.S. 536, 551 (1965).

tion of any traffic or other law created for the public safety or convenience.

In *Edwards* the defendants were arrested for participating in a protest at the South Carolina State House. Their conduct was nonviolent and consisted of ". . . loudly singing 'The Star Spangled Banner' and other patriotic and religious songs, while stamping their feet and clapping their hands."[35] The conduct in *Cox* was to be very similar to that in *Edwards* in that the defendant was to participate in the ". . . singing of the Star Spangled Banner and a 'freedom song,' recitation of the Lord's Prayer and the Pledge of Allegiance, and a short speech."[36] There was neither violence on the part of the protesters nor were there "fighting words."[37] In *Brown* the conduct consisted of the defendant's remaining in a "white" library after being instructed to leave by the librarian. At no time did Brown participate in making noise, a disturbance or violent behavior.[38]

While the breach of the peace statutes were declared unconstitutional in all three cases, the majority opinions explicitly expressed the view that the first amendment offers no protection against convictions based on a law which was designed to promote the public convenience and which was not susceptable to discriminatory application. In *Cox*, the Court states:

> [o]ne would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. . . . A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.[39]

In *Adderley v. Florida*[40] the majority of the Court upheld the conviction of civil rights demonstrators for trespassing upon the premises of a county jail contrary to a Florida trespass statute. The cases based on breach of the peace statutes were distinguished on the basis that the Florida trespass statute was not vague. The Court found that Florida had a right to prohibit people from trespassing on jail grounds and that "[t]he United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose."[41]

Riot II does not have the vagueness of the breach of the peace statutes in *Edwards*, *Cox*, and *Brown*.[42] On the contrary, as has been

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[35] Edwards v. South Carolina, 372 U.S. 229, 233 (1963).

[36] Cox v. Louisiana, 379 U.S. 536, 540-541 (1965).

[37] *Id.* at 547.

[38] Brown v. Louisiana, 383 U.S. 131, 136-137 (1966).

[39] Cox v. Louisiana, 379 U.S. 536, 554-55 (1965).

[40] 385 U.S. 39 (1966).

[41] *Id.* at 48.

[42] *See* note 10 *supra.*

noted earlier, Riot II would not have sanctioned the arrests in any of the above cases including *Adderley* as none of them involved violent and tumultuous conduct. It would seem from *Adderley* that instead of infringing the exercise of first amendment rights, the requirement of violent and tumultuous conduct provides them with more protection than is required.

In *Landry v. Daley*[43] a three judge federal district court considered the constitutionality of the Illinois Mob Action Statute, ILL. REV. STAT. ch. 38 § 25-1. The court held that one subsection of the statute which imposed criminal penalties on an assembly of two or more persons to do an unlawful act as impermissively vague and overly broad.[44] It was noted that the phrase "unlawful act" is not in its normal meaning limited to criminal acts, but includes torts or other civil wrongs.[45] It fails to appraise the public of the prohibited act. The court also felt that the subsection was ". . . a ready vehicle for the suppression of ideas."[46]

The other two subsections of the statute were held to be constitutional on the grounds that they required the use of force or violence which is not protected by the first amendment.[47] The Ohio riot statutes would seem to be analogous to this latter group.

The third intent (to commit or facilitate the commission of a misdemeanor), like the second intent, could be directed against civil rights demonstrations and mass acts of civil disobedience. Again, however, this intent must be coupled with the participation of four or more others in violent and tumultuous conduct. This statute does not proscribe mass actions of *peaceful* civil disobedience even where misdemeanors are committed. It would thus seem to go wide of any chance of being interpreted as unconstitutional on the grounds of its prohibiting the exercise of first amendment rights.[48]

Riot laws are generally subject to two complaints: they are either so general that they suppress the free expression of dissatisfaction by demonstration; or their application is so restricted that they are generally useless in preventing mass civil disorder that constitutes a serious threat to the public safety. Riot II seems to avoid both of these objections. While it embodies many situations which could threaten the public safety, it does not preclude the exercise of peaceful civil disobedience, or other types of peaceful mass demonstration.

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[43] 280 F. Supp. 938 (1968).

[44] *Id.* at 955.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 954, 956.

[48] *See* text accompanying notes 31 through 47 *supra*. *See also* note 24 *supra*.

B. *Riot in the First Degree*

The elements of Riot I may be paraphrased as follows:

A. Participation with four or more others in

B. Conduct which is (1) violent *or* (2) tumultuous

C. (1) With the intent to commit or facilitate the commission of a felony; or (2) to commit or facilitate the commission of any offense involving force or violence against persons, whether such offense is a misdemeanor or felony; or (3) where the actor or any participant to the knowledge of the actor uses or intends to use a firearm or other deadly weapon or dynamite or other dangerous explosive, or any incendiary device.

1. Participation

The meaning of the participation which is proscribed in Riot I is the same as in Riot II. It refers to an activity comprised of violent or tumultuous behavior rather than the several intents embodied in the statute. The element of participation includes not only situations in which five or more persons engage in violent or tumultuous conduct with a common purpose, but also the situation in which a person with one of the three intents contained in the statute joins in the violent or tumultuous conduct of four strangers.[49] The element of participation serves to limit the application of the statute to those actually engaged in the conduct and precludes its application to bystanders.[50]

2. Conduct

While the words violent and tumultuous have the same definitions for Riot I as they have for Riot II,[51] Riot I proscribes behavior which is violent *or* tumultuous while Riot II proscribes behavior which is violent *and* tumultuous. As the result of the use of the disjunctive, Riot I covers a much wider spectrum of conduct than Riot II.[52] For this reason, among others, Riot II is not a lesser included offense of Riot I.[53] The justification for this wider coverage of Riot I appears to be the more serious nature of the elements of intent contained in the statute.

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[49] *See* note 5 *supra.*

[50] The element of participation must be proved in order to obtain a valid conviction. Since a bystander would not be acting in a violent or tumultuous manner, he would not be participating and could not be convicted. The possibility that a bystander may be an aider or abettor is considered in section III of this article *infra.*

[51] *See* notes 7, 8 and 9 *supra.*

[52] In terms of set theory, Riot I embraces the union of violent conduct and tumultuous conduct while Riot II embraces only their intersection.

[53] While Riot II is not a lesser included offense of Riot I, it is an inferior degree of Riot I. This aspect of Riot I and Riot II are discussed in the text at section IV *infra.*

C. Intent

Riot I requires as an element an intent[54] to commit or facilitate the commission of a felony, or an intent to commit or facilitate an offense involving force or violence against persons. The violation is complete upon the concurrence of one of the above intents and the participation in violent or tumultuous conduct. Ordinarily a felony or an offense of force or violence is neither attempted nor committed until a person with the prerequisite intent begins the actual execution of the conduct which is proscribed.[55] Since Ohio law does not impose criminal sanctions for attempted crimes (except in cases where an attempt comes within one of the Ohio statutes which cover the attempts of certain specified crimes),[56] Riot I could not only impose liability on attempts not previously covered, but also on activities more remote than attempts.

Prior to the enactment of this statute, the law enforcement official was sometimes posed with a difficult choice when he had probable cause to believe that someone or a group of people intended to commit or facilitate the commission of one of the above crimes under the cover of a tumultuous or violent situation. If he acted too quickly, there could be no substantial conviction, since even if the accused admitted to the intent to commit a felony, he would not yet have legally committed it or even attempted it.[57] He could, at most, be convicted of breach of the peace or some related statute which carries a very light penalty.

If the official waited until the suspects either actually attempted or completed the commission of the felony, he risked injury to bystanders[58] or the escape of the felons in the resulting confusion. Assuming that there was probable cause to believe that several individuals intended to commit a felony, officers could under Riot I make an arrest as soon as the individuals began to participate in the tumultuous behavior and before they began the actual felony.[59] Although the individuals could not be convicted of the felony they intended to commit unless they had completed its execution, they could be convicted of Riot I.

This statute covers many circumstances which are not ordinarily considered to be riot situations. For example, any felony committed by five or more people whose conduct is considered to be tumultuous or violent, would violate Riot I as well as the particular felony statute.[60]

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[54] *See* discussion of the word intent with regard to Riot II in text accompanying notes 11 through 26 *supra.*

[55] Fox v. State, 34 Ohio St. 377 (1878).

[56] *E.g.*, OHIO REV. CODE ANN. § 2907.06 (Page 1953) (Attempt to Burn Property).

[57] Fox v. State, 34 Ohio St. 377 (1878).

[58] Bystanders could be injured either directly by the suspects, by a panic caused by the suspects to cover their crime or escape, or by the efforts of the law enforcement officials to apprehend the suspects.

[59] *See* note 24 *supra.* for discussion of the connection between participation and intent.

[60] An example would be a case in which five or more persons cooperated in purse snatching.

In these cases as convictions could seem to be made on both violations, Riot I, in effect, increases the penalities of certain existing crimes when they are committed by a group of five or more individuals. The serious nature of the crimes encompassed in the intents of Riot I seems to justify this result. The crimes covered in the statute may constitute a greater danger to the public and apprehending officers when they are committed by groups of five or more individuals than when they are committed by an individual or smaller groups.

The only portion of this statute which seems to have a possible constitutional infirmity is the segment dealing with the use or intended use of deadly weapons in a riot situation. When the subsection is read closely, it appears that if the actor knows that someone else has used a firearm, or other deadly weapon, the actor would be guilty of a violation of Riot I. Under this interpretation, a person who was in a tumultuous crowd and was himself behaving in a tumultuous manner, could be convicted of violating the statute if he heard or saw another member of the crowd discharge a firearm, or even throw a large rock.[61] The judicial interpretation of tumultuous would seem to include the spectators at a football rally or the participants of a floor demonstration at a national political convention.[62] This interpretation might well render this section of the statute unconstitutional on the grounds of overbreadth, since it appears to have a chilling effect on the exercise of first amendment rights.[63]

This possible constitutional defect could be eliminated in several ways. One of these is to define tumultuous in such a manner that it would exclude all activity which falls under the protection of the first amendment. Previous judicial interpretations of tumultuous, however, would be at variance with such a definition and it is likely that the legislature meant the word to have its commonly accepted meaning.[64] For this reason, this approach would not seem to be desirable.

A second approach is to contend that instead of a literal interpretation of the statute, the legislature meant the following: *(C) when the actor uses, or intends to use, or has knowledge that any participant intends to use a firearm or other deadly weapon, or dynamite or other dangerous explosive, or any incendiary device. . . .* A judicial interpretation of this nature would serve to implement the legislative intent to impose or increase penalties for certain acts when they occur under conditions of mass

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One person snatched the purse while the other four jostled the victim to district him or discourage him from resisting. This conduct which is violent and tumultuous could result not only in a conviction for Riot I, but also one for robbery.

[61] Acers v. United States, 164 U.S. 388 (1896).

[62] *See* notes 8 and 9 *supra.*

[63] *See* discussion of the *Edwards, Cox, Brown* and *Adderley* cases *supra.*

[64] *See* notes 7, 8 and 9 *supra.*

violence or tumult. At the same time it would not affect the exercise of first amendment rights. For these reasons, this method is preferred to the former.

The behavior proscribed by Riot I is, in general, more dangerous to the public safety than that proscribed by Riot II. In addition to being applicable to what would ordinarily be considered a riot situation, Riot I would also seem to apply to crimes of violence in which five or more people participate. The statute, with the exception of the subsection dealing with the knowledge or use of deadly weapons, seems to be free of constitutional defects.

III. A Possible Extension of Liability under Riot I and Riot II by the Ohio Aider and Abettor Statute

A possible exception to the elements developed in the previous section of this article could result from the application of Ohio's aider and abettor statute:

> Any person who aids, abets, or procures another to commit an offense may be prosecuted and punished as if he were the principal offender.[65]

In order to qualify as an aider or abettor a person must generally be in a prior conspiracy with the principal, encourage the principal to commit the crime, or do some overt act with an intent to bring about the result.[66]

This statute could possibly result in the application of Riot I or Riot II against a conspirator of the principal (actor) although the conspirator was not physically present or participating in the violent and/or tumultuous conduct.[67] Under the Ohio cases it would seem necessary for a conspirator to ". . . combine either by express agreement or by actual conduct in the commission of an unlawful act, that is, an act made unlawful by statute. . . ."[68] to be guilty of Riot I or Riot II. The meaning of the word combine is ambiguous. The courts usually indicate that in order to combine a person must have the purpose to commit the illegal act,[69] although at times their language supports the proposition that it is

[65] Ohio Rev. Code Ann. § 1.17 (Page 1953).

[66] Woolweaver v. State, 50 Ohio St. 277, 34 N.E. 352 (1893); Goins v. State, 46 Ohio St. 457, 471, 21 N.E. 476 (1889); State v. Shephard, 15 Ohio App.2d 88, 93, 239 N.E.2d 116 (1968).

[67] State v. Doty, 94 Ohio St. 258, 113 N.E. 811 (1916); Breese v. State, 12 Ohio St. 146 (1861); Hess v. State, 5 Ohio 1 (1831); State v. Palfy, 11 Ohio App.2d 142, 229 N.E.2d 76 (1967).

[68] Black v. State, 103 Ohio St. 434, 440, 133 N.E. 795 (1921).

[69] *E.g.*, Stephens v. State, 42 Ohio St. 150, 153 (1884) (common purpose); Hanoff v. State, 37 Ohio St. 178, 184 (1881) (joint design); Rufer v. State, 25 Ohio St. 464, 473, 474 (1874) (common design); State v. Ullner, 105 Ohio App. 546 (1957), 143 N.E.2d 849, *aff'd* 167 Ohio St. 521 (1958) (common enterprise); Richards v. State, 43 Ohio App. 212, 183 N.E. 36 (1932) (general conspiracy); Licavoli v. State, 20 Ohio Op. 562, 34 N.E.2d 450 (1935) (conspiracy).

sufficient if one joins the others with the knowledge that they have the purpose of committing an illegal act.[70] The latter position was advanced and later abandoned by the Model Penal Code.[71] Under either view, however, liability is not extended to those who conspire with others to do an act which, while not unlawful in itself, is likely to result in a violation of the law.[72]

In addition to the conspiracy it is necessary to show that the violation of Riot I or Riot II ". . . might have been contemplated, reasonably, as likely to result from the attempt to commit the act intended. . . ."[73] If an actor and a conspirator intended (as defined above) to violate Riot I, Riot II, or some other statute which was likely to result in a violation of Riot I or Riot II, the conspirator would be deemed to have participated in the crime although not even present.[74]

If the sole purpose of the actor and the conspirator were the exercise of a legal right, for example, the organizing and leading of a lawful demonstration, and, the actor or other members of the demonstration violated either Riot I or Riot II, the conspirator under the above authority would not be guilty. This would be true even if the violations were likely to result from the demonstration.[75]

In order to hold otherwise, one would have to contend that the probability that violence might erupt from such a demonstration is equivalent to the purpose of having it erupt. In the terms of the Model Penal Code this would be to hold the conspirator guilty for recklessness or negligence and not purpose or knowledge with respect to the unlawful objective of the conspiracy.[76] While both the Model Penal Code and the Ohio cases seem to employ a concept of recklessness or negligence as to the responsibility for the means used to accomplish the objective,[77] the

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[70] Woolweaver v. State, 50 Ohio St. 277, 280, 281, 34 N.E. 352 (1893); State v. Munson, 25 Ohio St. 381 (1874) (selling liquor to an adult with knowledge that adult is going to give it to a minor makes the seller liable as an aider and abettor); Anderson v. State, 7 Ohio 539 (1836) (Person without knowledge that certificate of deposit is forged cannot be convicted as an aider and abettor although he helps the forger to pass it.); Crouch v. State, 37 Ohio App. 366, 174 N.E. 799 (1930) (Defendant's offer to buy cars from those whom defendant knows will then go out and steal them is sufficient to make him an aider and abettor to the larceny).

[71] MODEL PENAL CODE § 2.04(3) (Tent. Draft No. 1, 1953); MODEL PENAL CODE § 2.06(3) (Proposed Official Draft, 1962).

[72] *See* MODEL PENAL CODE § 2.04(3), Comment (Tent. Draft No. 1, 1953) at 20-33 for a general discussion of federal cases relating to this matter. *See* Anderson v. State, 7 Ohio 539 (1836); State v. Shephard, 15 Ohio App.2d 88, 239 N.E.2d 116 (1968). *See also* Baldwin v. State, 23 Ohio Abs. 147 (1936); Gallo v. State, 6 Ohio Abs. 588 (1928).

[73] Goins v. State, 47 Ohio St. 457, 467, 34 N.E. 352 (1893).

[74] *E.g.*, State v. Doty, 94 Ohio St. 258, 113 N.E. 811 (1916); Stephens v. State, 42 Ohio St. 150 (1884); Hess v. State, 5 Ohio 12 (1831); State v. Palfy, 11 Ohio App.2d 142, 229 N.E.2d 76 (1967), Licavoli v. State, 20 Ohio Op. 562, 34 N.E.2d 450 (1935).

[75] MODEL PENAL CODE § 2.04(3) Comment (Tent. Draft No. 1, 1953) at 24; *see* note 72 *supra.*

[76] *See* note 12 *supra.*

[77] *See* notes 73 and 74 *supra.*

conspirator must have the purpose to commit the illegal act or knowledge that he is helping others whose purpose is to commit it before liability is imposed.[78]

Such an interpretation could also encounter constitutional difficulties as applied to the exercise of first amendment rights (eg. peaceful demonstrating) since it could in effect, allow ". . . persons to be punished merely for peacefully expressing unpopular views."[79] It would thus seem to be necessary to show that a person conspired with another for the purpose of having him engage in certain illegal conduct which, by its nature, could reasonably, and did, result in a violation of Riot I or Riot II before he could be convicted as an aider and abettor.

Whether other participants in the riotous conduct who are not conspirators of the actor are aiders or abettors would seem to depend in part on whether they knew of the actor's violation and whether they continued their riotous behavior.[80] If the other participants were unaware of the actor's violation, it would seem absurd to hold them as aiders or abettors as there would be neither purpose nor knowledge. The same would appear to be true, if, upon becoming aware of the actor's violation, the other participants disengaged themselves from the riotous behavior.[81] If, however, upon awareness of the actor's violation, the others continued their riotous behavior, their status as aiders and abettors is unclear.

If the actor's violation of the law consisted solely of a violation of Riot I or Riot II, the continued conduct of the others could not make them aiders and abettors, since a common law accessory after the fact is not an aider and abettor in Ohio.[82] This does not, however, mean that one or more of the other participants could not be violating Riot II. It is conceivable that any other participant who continued to act violently and tumultuously with four or more others and knew that the actor had violated either Riot I or Riot II could under some circumstances be considered as intending to obstruct a function of government[83] (ie. the

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[78] *See* notes 69, 70 and 72 *supra.*

This standard of negligence for the actual result is not to be confused with the purpose to commit a criminal act which is required for a conspiracy to exist. For example, A combines with B and C for the *purpose* of committing a burglary. During the attempted burglary, B commits a battery on D, an occupant of the house they are burglarizing. A would also be guilty of the battery on D as the battery is reasonably likely to result (standard of negligence) from their attempt (purpose) to burglarize.

[79] Cox v. Louisiana, 379 U.S. 536, 551 (1965). Also see the constitutional arguments discussed elsewhere in the text.

[80] Liability incurred under incitement to riot (OHIO REV. CODE ANN. § 2923.54 (Page Supp. 1968)) is outside the scope of this article.

[81] MODEL PENAL CODE § 2.06(6) (Proposed Official Draft, 1962).

[82] State v. Lingerfelter, 77 Ohio St. 523, 83 N.E. 897 (1908).

[83] This result depends to a large extent on the meaning of the word intent as used in Riot II. As was discussed earlier, this meaning is unclear, but it could include knowledge under some circumstances. The difference between purpose and knowledge would be minimal where

apprehension of the actor by the police), and be guilty of Riot II. The same reasoning would apply if the actor intended to commit or facilitate one of the other substantive crimes contained in Riot I or Riot II and had in fact completed it.

If the actor intended to commit (or facilitate) one of the other substantive crimes contained in Riot I or Riot II, and had not yet completed it, the continued violent or tumultuous conduct of another person who knew of the actor's intent might in some circumstances make him an aider and abettor of the actor in that other crime.[84] In such a case he could also be considered as intending to facilitate that crime.[85] Depending on the number of people participating and the nature of his conduct, this could constitute a violation of either Riot I or Riot II.

IV. Riot II: A Lesser Offense of Riot I

Whether riot in the second degree is a lesser offense of riot in the first degree will be of great importance to both future defendants and prosecutors. The importance of this question stems not only from its effect on the informal practice of plea bargaining, but also from the following considerations which may substantially affect a defendant's criminal liability: one who is charged with a greater offense can be convicted of a lesser offense;[86] acquittal or conviction of a lesser offense bars conviction of the greater offense;[87] conviction of the greater offense bars conviction of a lesser offense;[88] acquittal of the greater offense bars conviction of the lesser offense in a later action.[89]

Riot II qualifies as a lesser offense of Riot I under the authority of section 2945.74 Ohio Rev. Code[90] which provides:

> [w]hen the indictment or information charges an offense, including different degrees . . . the jury may find the defendant not guilty of the degree charged but guilty of an inferior degree thereof. . . .

While this statute additionally provides that lesser included offenses are also lesser offenses, a comparison of the elements of the two riot statutes will show that Riot II is probably not a lesser included offense of Riot I. In order to be a lesser included offense of Riot I the elements of Riot

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the other participant saw the police trying to apprehend the violator and consciously impeded them by his conduct.

84 The consideration of what constitutes an aider and abettor for crimes other than Riot I and Riot II is beyond the scope of this article.

85 *See* note 83 *supra.*

86 Ohio Rev. Code Ann. § 2945.74 (Page 1953).

87 State v. Behimer, 20 Ohio St. 572, 577 (1870).

88 *Id.*

89 *Id.*

90 Ohio Rev. Code Ann. § 2945.74 (Page 1953).

II must *necessarily* be present within the *essential* elements of Riot I.[91] One need examine the statutes no farther than the element of conduct. While it is not essential to prove both violent and tumultuous conduct in Riot I, it is essential to prove them both in Riot II. Riot II, therefore, is not a lesser included offense of Riot I.

The situation of Riot I and Riot II is analogous to that in *State v. Daniels*[92] in which the defendant was indicted for aggravated rape[93] and subsequently convicted for statutory rape.[94] As statutory rape requires the additional element (in comparison to aggravated rape) that the defendant be at least 18 years old, it cannot be a lesser offense included within aggravated rape.[95] The court concluded, however, that because both statutes represent the crime of rape, and because statutory rape carries a lesser penalty than aggravated rape, the legislature intended statutory rape to be an inferior degree of aggravated rape.[96] Riot II is clearly an inferior degree of Riot I as it not only meets the requirements in *Daniels*, but is also so labeled. It is impossible to conclude otherwise.

Roger H. Norman

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[91] State v. Daniels, 169 Ohio St. 87, 157 N.E.2d 736 (1959); State v. Hreno, 162 Ohio St. 193, 122 N.E.2d 681 (1954); State v. Muskus, 158 Ohio St. 276, 109 N.E.2d 15 (1952).

[92] 169 Ohio St. 87, 157 N.E.2d 736 (1959).

[93] OHIO REV. CODE ANN. § 2905.02 (Page 1953).

[94] OHIO REV. CODE ANN. § 2905.03 (Page 1953).

[95] State v. Daniels, 169 Ohio St. 87, 100, 157 N.E.2d 736 (1959).

[96] *Id.* at 101, 102.